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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

BESSIE MALONE  
Plaintiff

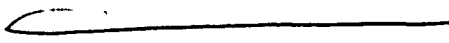
Case No: CV-07-644099

Judge: BRENDAN J SHEEHAN

JOSE TORRES ET.AL.  
Defendant

**JOURNAL ENTRY**

DEFENDANT(S) JOSE TORRES(D1) AND CITY OF CLEVELAND POLICE DEPT(D2) DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, FILED 09/26/2008, IS GRANTED AND DENIED IN PART. OPINION AND JOURNAL ENTRY FILED. O.S.J.

  
\_\_\_\_\_  
Judge Signature

\_\_\_\_\_  
Date

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

BESSIE MALONE,	)	CASE NO. CV-07-644099
Plaintiff	)	
v.	)	JUDGE BRENDAN J. SHEEHAN
JOSE TORRES, et al.,	)	
Defendants	)	OPINION AND JOURNAL ENTRY
	)	
	)	

I. Background Facts

Plaintiff Bessie Malone and her sister, Dorothy Small, were returning home from church on December 14, 2005 at approximately 9:20 pm. The road surfaces were dry. As they drove northbound on Eddy Rd., the car they were riding in was struck by Defendant City of Cleveland police unit 622, driven by Defendant Jose Torres, at the intersection of Eddy Rd. and the Interstate 90 East ramp.

Defendant Torres and fellow police officer, Victor Claudio, both of whom were in the police vehicle at the time of the collision, have stated that they were following a vehicle that was weaving recklessly in and out of traffic on Interstate 90 as the suspect vehicle attempted to flee on surface roads after exiting the highway. Officers Torres and Claudio both report that the police vehicle slid on a large patch of rock salt, sand and gravel, causing the impact with Plaintiff's car.

Plaintiff Malone and her sister state that they did not see the vehicle Officers Torres and Claudio were pursuing and further maintain that the police unit did not have overhead emergency lights or sirens on. Officers Torres and Claudio maintain that they engaged both emergency lights and siren upon exiting Interstate 90.

Plaintiff brought suit against the City of Cleveland and Officer Torres, alleging negligent and/or willful or wanton operation of the police vehicle. Defendants City of Cleveland and Torres have moved for summary judgment on the basis of sovereign immunity pursuant to R.C. Chapter 2744.

## II. Summary Judgment Standard

Under Civ.R. 56, summary judgment is appropriate when, (1) no genuine issue as to any material fact exists, (2) the party moving for summary judgment is entitled to judgment as a matter of law, and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can only reach one conclusion which is adverse to the non-moving party. *Holliman v. Allstate Ins. Co.* (1999), 86 Ohio St.3d 414, 1999 Ohio 116, 715 N.E.2d 532; *Temple v. Wean United, Inc.* (1997), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

## III. Sovereign Immunity

Determining whether the Defendants are immune from tort liability pursuant to R.C. Chapter 2744 involves a three-tiered analysis: first, determining if the political subdivision is engaged in a governmental or proprietary function, then analyzing whether any of the statutory exceptions impose liability, and, finally, determining if statutory defenses apply. *Colbert v. Cleveland* (2003), 99 Ohio St. 3d 215, 216, 2003 Ohio 3319; 790 N.E.2d 781, 783.

The parties do not contest general issues of sovereign immunity; rather, the dispute centers on the following exception to liability:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or

property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct

R.C. §2744.02.

Plaintiff contends that the police unit was not on an emergency call and/or the operation of the vehicle was willful or wanton misconduct. Plaintiff has testified that she did not observe a car following the path described by Officers Torres and Claudio. To the contrary, Officers Torres and Claudio assert that they were duty bound to investigate and pursue a reckless driver.

The question as to whether a particular situation constitutes an emergency call is a question of fact. *Horton v. Dayton* (1988), 53 Ohio App. 3d 68, 558 N.E.2d 79. In this case, the evidence is conflicting with an absence of independent corroborating evidence of the events immediately preceding the collision. As such, this issue centers on the credibility of the witnesses and is not properly considered on summary judgment.

Accordingly, Defendant City of Cleveland's motion for summary judgment as to claims against it must be denied.

Plaintiff's claims against Defendant Torres, however, rely upon a different statutory basis. The provision applicable to Defendant Torres, as an employee of the City of Cleveland, is:

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of

the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner

R.C. §2744.03

There is no claim or evidence that Defendant Torres was acting outside his official responsibilities. Therefore, for liability to attach, his actions must have been taken "with malicious purpose, in bad faith, or in a wanton or reckless manner." As applied to R.C. 2744.03(A)(6)(b), "recklessness" has been described as a perverse disregard of a known risk. *O'Toole v. Denihan* (2008), 118 Ohio St. 3d 374, 386, 889 N.E.2d 505, 517-18; *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 356, 639 N.E.2d 31.

The standard for showing wanton misconduct is similarly high: it is the failure to exercise any care whatsoever. *Hawkins v. Ivy* (1977), 50 Ohio St.2d 114, 363 N.E.2d 367; see, also *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 96-97, 269 N.E.2d 420, 422 ( "mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor."). The term "willful misconduct" has been defined as "the intent, purpose, or design to injure." *Gladon v. Greater Cleveland Regional Transit Auth.* (1996), 75 Ohio St.3d 312, 319, 662 N.E.2d 287.

Plaintiff's evidence of wanton misconduct, viewed in a light most favorable to her as the non-moving party, is that Defendant Torres was traveling "pretty fast" without

overhead lights or siren, although she also admits that she did not see the police vehicle until after the collision. Plaintiff has also testified that the roads were dry and traffic was not heavy at the intersection. There is no evidence that Defendant Torres operated the vehicle with extreme speed. Additionally, flashing lights and sirens are neither prerequisites for immunity nor conclusive evidence of recklessness. *Natale v. City of Rocky River* (2008), 2008 Ohio 5868, P11-12.

Viewed most favorably to her, Plaintiff has offered an issue of material fact on mere negligence, not reckless, willful, or wanton misconduct. Accordingly, summary judgment in favor of Defendant Torres is granted.

IV. CONCLUSION

For the foregoing reasons, summary judgment in favor of Defendant City of Cleveland is denied and summary judgment in favor of Defendant Jose Torres is granted.

IT IS SO ORDERED.

  
JUDGE BRENDAN J. SHEEHAN

Date: January 27, 2009

RECEIVED FOR FILING

JAN 29 2009

GERALD E. FUERST, CLERK  
By  Deputy

CERTIFICATE OF SERVICE

A copy of the foregoing Opinion and Judgment Entry was mailed this 27 day of

January, 2009 by regular U.S. mail to:

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